Lim King Kow v Indra Kemajuan Sdn Bhd & Ors

HIGH COURT (JOHOR BAHRU) — ORIGINATING PETITION NO MT3–26–3 OF 2005
JEFFREY TAN J
5 AUGUST 2009

Companies and Corporations — Member's rights — Oppression — Petition under s 181 of the Companies Act 1965 — Whether visible departure from standard of fair dealing or fair play — Whether oppressed constrained to submit to overbearing act or attitude of oppressor — Whether capital and profits not reinvested — Whether petitioner's investment in company improperly 'detained' — Company's capital and profits left lying idle to spite petitioner — Whether oppression on minority established — Reduction of capital by purchase of petitioner's shares

The first respondent ('IK') was incorporated in 1982. The appellant and the other respondents were the shareholders. With control of the second respondent coupled with his own shareholding, the third respondent effectively controlled 95% of the issued capital of IK. Effectively, the third respondent had complete control of IK. IK was dormant from the date of its incorporation in 1982–1993, when it purchased a piece of land in Johor Bahru ('the said land'). IK subdivided the said land and sold all the subdivided plots, realising proceeds of RM10,544,347.00. By then, the petitioner had resigned as director of IK, had been released as guarantor of the bank loan granted to IK, and had been repaid the monies which he had loaned to IK. The petitioner contended that the reason for his resignation was because he could no longer bear the abuse of the third respondent. After the resignation of the petitioner, the third respondent and other directors continued as directors. In 2005, that was before presentation of the instant winding up petition, IK purchased a piece of land known as Lot 552 ('Lot 552'). The petitioner petitioned for relief under s 181 of the Companies Act 1965 ('the Act'), complaining about the following: (i) payment of management fees of RM750,000 by the first respondent to the second respondent; (ii) grant of loans by the first respondent to the second respondent; (iii) payment of directors' fees to the directors of the first respondent after the petitioner resigned as a director; (iv) refusal of the majority shareholders to accept the petitioner's repeated offers to sell his shares in the first respondent whereas an offer from another minority shareholder, the fourth respondent, was accepted; and (v) the rejection of the petitioner's request for return of investment to shareholders via voluntary

winding up based on the petitioner's contention that the first respondent was dormant since 2000 after the sale of the said land.

Held, allowing the petition with costs to be borne by the second to fourth respondents:

(1) For there to be oppression, there must be a visible departure from the standard of fair dealing or fair play or where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor. The question of whether there is oppression in a given case is a question of fact, to be answered not by a consideration of events in isolation but as part of a consecutive story (see paras 19 & 22).

(2) Here, the total story showed that majority rule had passed into rule oppressive of the petitioner. The business object had been achieved. Capital and profits had not been reinvested. Under those circumstances, the return of investment was a legitimate expectation. The investment of the fourth respondent was returned, by way of the purchase of the shares of the fourth respondent. But the investment of the petitioner was 'detained', despite the fact that all capital and accumulated profits were there and not reinvested. The majority would rather have the capital and profits lying idle, to spite the petitioner (see para 22).

(3) It was on account of the will of the majority that IK was completely idle, practically moth-balled, for six years. That could not have served the interest of the minority. It was the abuse of majority rule to have IK idle for all those years in the face of the demand by the petitioner for the return of his investment. That abuse was also a visible departure from the standards of fair dealing and a violation of the conditions of fair play which the petitioner was entitled to expect from the majority, which was certainly not to hold on idly to his investment for years and years on end. If there were no use for capital, then rightly so it should be returned (see para 22).

(4) Lot 552 was only purchased in 2005. Hence, Lot 552 could not be advanced to exculpate the inactivity of IK from 1999 to 2005. Lot 552 was hurriedly purchased to lend a convenient excuse to the majority to resist this petition. However, the majority could not relate on the development of Lot 552 since 2005. Lot 552 was purchased and then left just like that in its original condition. That should not be so if it were a genuine business undertaking. It was improbable that Lot 552 was purchased as a genuine undertaking (see para 23).

(5) The affairs of IK were conducted in a manner oppressive to the minority. That should not be allowed to continue. The majority opposed winding up. The minority wanted out. Both positions were not irreconcilable. Of the options, the reduction of share capital, which

would hardly touch the capital of IK, was most appropriate. Accordingly, the capital of IK was to be reduced by 5%, that is, by the purchase of the petitioner's 25,000 shares by IK, and by the payment of 5% of RM3,797,691.63 (the unappropriated profits of IK in 2007) by IK to the petitioner within 30 days from the day of the order (see paras 24–25).

[Bahasa Malaysia summary

Responden pertama ('IK') ditubuhkan pada 1982. Perayu dan responden-responden lain merupakan pemegang saham. Dengan kawalan responden kedua bersama sahamnya, responden ketiga mengawal 95% modal diterbitkan IK. Oleh itu, responden ketiga mempunyai kawalan penuh IK. IK tidak aktif sejak ditubuhkan pada 1982–1993, apabila IK membeli sebidang tanah di Johor Bahru ('tanah tersebut'). IK memecah bahagi tanah tersebut dan menjual kesemua plot yang telah dipecah bahagi dan mendapat keuntungan sebanyak RM10,544,347. Pada ketika itu, pempetisyen telah meletakkan jawatan sebagai pengarah IK, dilepaskan sebagai penjamin pinjaman bank yang diberikan kepada IK, dan telah dibayar wang yang telah dipinjamkannya kepada IK. Pempetisyen berhujah bahawa sebab perletakan jawatannya disebabkan dia tidak sanggup lagi menerima penyalahgunaan kuasa responden ketiga. Selepas perletakan jawatan pempetisyen, responden ketiga dan pengarah-pengarah lain terus menjadi pengarah. Dalam tahun 2005, iaitu sebelum petisyen penggulungan difailkan, IK membeli sebidang tanah iaitu Lot 552 ('Lot 552'). Pempetisyen mempetisyen untuk relief di bawah s 181 Akta Syarikat 1965 ('Akta'), mendakwa yang berikut: (i) bayaran yuran pengurusan sebanyak RM750,000 oleh responden pertama kepada responden kedua; (ii) pemberian pinjaman-pinjaman oleh responden pertama kepada responden kedua; (iii) bayaran yuran pengarah kepada pengarah-pengarah responden pertama setelah pempetisyen berhenti menjadi pengarah; (iv) keengganan pemegang saham majoriti menerima tawaran-tawaran pempetisyen untuk menjual sahamnya kepada responden pertama sedangkan tawaran daripada pemegang saham minoriti, iaitu responden keempat diterima, dan (v) penolakan permintaan pempetisyen untuk keuntungan pelaburan diberikan kepada pemegang-pemegang saham menerusi penggulungan sukarela berdasarkan hujahan pempetisyen bahawa responden pertama tidak aktif sejak tahun 2000 selepas penjualan tanah tersebut.

Diputuskan, membenarkan petisyen dengan kos ditanggung oleh responden kedua hingga keempat:

(1) Bagi menunjukkan penindasan, mestilah terdapat penyimpangan daripada standard urusan yang adil atau bersikap adil atau di mana pihak yang tertindas dipaksa tunduk kepada tindakan atau peri laku pihak yang menindas. Persoalan sama ada terdapatnya penindasan

dalam sesuatu kes merupakan persoalan fakta, harus dijawab bukannya daripada pertimbangan ke atas kejadian-kejadian secara berasingan tetapi daripada sebahagian daripada cerita yang berturutan (lihat perenggan 19 & 22).

(2) Di sini, daripada keseluruhan penceritaan menunjukkan bahawa peraturan majoriti telah menjadi peraturan yang menindas pempetisyen. Objektif perniagaan telah tercapai. Modal dan keuntungan tidak dilabur semula. Dalam keadaan sedemikian, keuntungan pelaburan adalah jangkaan yang sah. Pelaburan responden keempat diberikan kepadanya menerusi pembelian saham responden keempat. Tetapi pelaburan pempetisyen telah ditahan, meskipun kesemua modal dan keuntungan terkumpul ada dan tidak dilabur semula. Pemegang-pemegang saham majoriti lebih suka mensia-siakan modal dan keuntungan untuk menyakitkan hati pempetisyen (lihat perenggan 22).

(3) Atas kehendak pemegang-pemegang saham majoritilah IK terbiar tidak aktif selama enam tahun. Perkara sedemikian tentunya tidak menjaga kepentingan pemegang-pemegang saham minoriti. Ini merupakan penyalahgunaan peraturan majoriti menjadikan IK tidak aktif bertahun-tahun lamanya apabila pempetisyen menuntut keuntungan pelaburannya. Penyalahgunaan tersebut juga merupakan penyimpangan daripada standard urusan yang adil dan merupakan pencabulan kepada sikap yang adil yang mana pempetisyen berhak untuk menjangka daripada pemegang-pemegang saham majoriti, yang mana tentunya tidaklah untuk mensia-siakan pelaburan pempetisyen bertahun-tahun lamanya hinggalah ke akhirnya. Jika modal tidak diperlukan, maka haruslah dipulangkan (lihat perenggan 22).

(4) Lot 552 hanya dibeli pada tahun 2005. Maka, Lot 552 tidak boleh dihujahkan sebagai urusan aktif IK dari 1999–2005. Lot 552 dibeli secara tergesa-gesa untuk dijadikan alasan oleh pemegang-pemegang saham majoriti bagi menghalang petisyen ini. Tetapi, pemegang-pemegang saham majoriti tidak boleh mengaitkan pembangunan atas Lot 552 sejak 2005. Lot 552 dibeli dan kemudiannya dibiarkan begitu sahaja dalam keadaan asalnya. Perkara begitu tidak seharusnya berlaku jika ia merupakan urusan perniagaan yang tulen. Tidak mungkin Lot 552 dibeli atas urusan perniagaan yang tulen (lihat perenggan 23).

(5) Urusan-urusan IK dilaksanakan menindas pemegang-pemegang saham minoriti. Perkara tersebut tidak harus dibenarkan berterusan. Pemegang-pemegang saham majoriti menentang penggulungan. Pemegang-pemegang saham minoriti mahu mencari jalan keluar. Kedua-duanya tiada jalan tengah. Daripada pilihan-pilihan, pengurangan saham modal, yang mana tidak menggugat modal IK,

A adalah bersesuaian. Maka, modal IK dikurangkan sebanyak 5%, iaitu dengan pembelian saham-saham pempetisyen sebanyak 25,000 oleh IK, dan pembayaran 5% daripada RM3,797,691.63 (keuntungan IK yang tidak diasingkan pada 2007) oleh IK kepada pempetisyen dalam masa 30 hari dari tarikh perintah (lihat perenggan 24–25).]

B

Notes

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 496–543.

C **Cases referred to**

Dato' Toh Kian Chuan v Swee Construction and Transport Company (Malaya) Sdn Bhd [1996] 1 MLJ 730, HC (refd)

Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (refd)

D *Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors* [2007] 1 MLJ 508, CA (refd)

Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors [1994] 1 MLJ 520; [1994] 1 AMR 381, HC (refd)

E *Kong Thai Sawmill (Miri) Sdn Bhd, Re; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227, PC (folld)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)

Tivoli Freeholds Ltd, Re [1972] VR 445, SC (refd)

F

Legislation referred to

Companies Act 1948 [UK] s 210

Companies Act 1965 s 181

G *LC Yeoh (Tay & Partners) for the petitioner.*
KC Tho (KC Tho & Partners) for the respondents.

Jeffrey Tan J:

H

[1] This is a member's petition for relief under s 181 of the Companies Act 1965 to bring to an end or to remedy the matters complained of in the conduct of the affairs of the first respondent ('IK')

I **[2]** These are the pertinent background facts. IK was incorporated on 13 July 1982 with the petitioner and third respondent as the promoters and original subscribers. As at 31 December 1995, the issued and fully paid shares of IK (issue share capital of RM500,000 divided into 500,000 ordinary shares of RM1 each) was held by the petitioner (25,000 shares or 5%), the second

respondent (400,000 shares or 80%), the third respondent (25,000 shares or 5%), and the fourth respondent (50,000 shares or 10%). As at the date of this petition, (i) the issued and fully paid up capital of the second respondent was held by the petitioner (10%), and by the third respondent and his family company (Teo Poh Boon Enterprise Sdn Bhd) (65%), (ii) the directors of IK were the third respondent (who was the managing director of both IK and the second respondent), the fourth respondent, the fifth respondent (appointed director in 1996) and the sixth respondent (son of the third respondent, and appointed director in 2003). At present, the issue share capital of IK is held by the petitioner (5%), the second respondent (90%), and the third respondent (5%). In turn, the issued share capital of the second respondent is held by the petitioner (4%), the third respondent (42.8%), the third respondent's said family company (40.2%), and other minor shareholders (13%). With 83% of the issued share capital of the second respondent, the third respondent and his family company control IK. Indeed, with control of the second respondent coupled with his own shareholding, the third respondent effectively controls 95% of the issued capital of IK. Quite clearly, the third respondent has complete control of IK.

[3] By all accounts, IK was dormant from the date of its incorporation in 1982 until 8 November 1993, when it purchased a piece of agricultural land held under MG 707 for Lot 52 Mukim Tebrau, Tampoi, Johor Bahru ('the said land') at the price of RM4,298,478. That purchase price was raised by the payment up of shares and by loans from a bank and from shareholders including the petitioner. After that, IK subdivided the said land into six subdivided industrial lots ('the said lots') which IK later sold (four lots in 1996 and two lots in 1999) and realised the sale proceeds of RM10,544,347. By then, the petitioner had resigned as director of IK (with effect from 10 August 1996), had been released as guarantor of the bank loan granted to IK, and had been repaid (on or about 13 April 1996) the sum (RM225,000) that he had loaned to IK.

[4] The petitioner contended that the reason for his resignation was because he could no longer bear the abuse of the third respondent. On the other hand, the third respondent contended that the said resignation was actuated by the desire of the petitioner to be relieved of his liability as guarantor of IK. After the resignation of the petitioner, the third respondent and other directors continued as directors. Thereafter, the affairs of IK were conducted without the petitioner who complained that those affairs were conducted or the powers of the directors were exercised in a manner oppressive or in disregard of his minority interest. The respondents disputed that. There was however all round agreement on the issue to be tried, which is as follows:

Whether the following acts are oppressive to or in disregard of or unfairly discriminates against or is otherwise prejudicial to the Petitioner's minority interest, under s 181(1)(a) and (b) of the Companies Act:

(a) payment of management fees of RM750,000.00 by the first respondent to the second respondent in view of the circumstances under which such management fees were paid;

(b) grant of loans by the first respondent to the majority shareholder, the second respondent, in view of the circumstances under which such loans were granted;

(c) payment of directors' fees to the directors of the first respondent after the petitioner resigned as a director in the light of the facts of this case;

(d) Failure or refusal of the majority shareholders to accept the petitioner's repeated offers to sell his shares in the first respondent under the circumstances of this case where an offer from another minority shareholder, the fourth respondent, was accepted;

(e) rejection of the p[etitioner's request for return of investment to shareholders via voluntary winding up based on the petitioner's contention that the first respondent was dormant since 2000 after the sale of all the pieces of converted sub-divided parcels of land at Tampoi, Johor.

[5] All facts asserted in the aforesaid agreed issue are agreed facts. The 25 facts in the statement of agreed facts marked 'B'), which would be alluded to now and again in the course of this grounds, are also agreed facts.

[6] The petitioner, a renovation contractor, testified at some length. Suffice it to say that the petitioner questioned the management fee of RM750,000 that IK paid to the second respondent in 1995, the directors' fees of RM100,000 that IK paid to the third, fourth and fifth respondents in 1999, and the unsecured loans (for those loans, see agreed fact 17) that IK granted to the second respondent from 2000–2007. Further, the petitioner contended that IK should be wound up after the sale of the said lots, and that the third respondent, in buying the fourth respondent's shares but not his shares, had discriminated against him.

[7] In relation to those complaints, it was the testimony of the petitioner that (i) it was him who managed and obtained formal approval for the conversion and subdivision of the said land into the said lots, (ii), IK paid a management fee of RM750,000, ostensibly for securing and facilitating the approval for conversion and subdivision of the said land, to the second respondent in 1995, (iii) when he resigned in 1996 as director, he offered to sell his shares in IK to the second and third respondents at the price of RM15 per share, (iv) IK was totally inactive after sale of the said lots, (v) at the 14th AGM of IK, the third respondent said that the object of IK was the

development of the said land, (vi) with the sale of the six said lots, there was no reason for IK to continue to exist, (vii) he would not be able to see the return of his investment should IK continue to exist, (viii) in 2000, he again offered to sell his shares, at the price of RM7 per share, (ix) at about that time, the fourth respondent also offered the sale of his shares at the price of RM6.45 per share, (x) thereupon, he made a similar offer to sell his shares at the price of RM6.45 per share, (xi) the second respondent accepted the offer of the fourth respondent in 2000 but rejected his offer in 2001, even though the financial position of the second respondent in 2001 with shareholders' funds of RM3,600,000, was better than in 2000, (xii) funds of IK were loaned to the second respondent without any agreement, security or approval by the general body, (xiii) in 2005, he again offered to sell his shares, at the price of RM8 per share, (xiv) both his offer and his call for an EGM were rejected, (xv) he could not dispose of his minority interest to any outsider, (xvi) he would sell his shares based on the cash in hand of IK in 2007 (see the petitioner's bundle of documents, p 27), that is, at the price of RM7.51 per share. The petitioner further testified that he is the only shareholder who is not a director, and that the fourth to sixth respondents are directors without any shares in IK.

[8] Under cross-examination, the petitioner added that (i) whilst he was still a director, the payment of directors' fees was considered by the board, (ii) IK had no income from the date of its incorporation to the date of sale of the said lots, (iii) directors' fees were not paid during that period, (iv) the expenses of IK, and the costs and expenses incidental to the conversion of the said land were advanced by the second respondent, and (v) IK had no employees, no office and no administrative costs. The petitioner denied that the relationship between the petitioner and the third respondent soured because IK had stopped the giving of contract works to the company (Johor Bahru Pyramid Sdn Bhd, then jointly owned by the petitioner and the third respondent) managed by the petitioner. But the evidence of the petitioner about his offer of sale of his shares and about the purchase by the second respondent of the shares of the fourth respondent were not challenged.

[9] The third respondent testified as follows. He was the managing director of IK and the second respondent and eight other housing development companies (for those eight companies, see p 362 of the agreed bundle). In all, he had developed more than 5,000 houses. He was the central figure who obtained the conversion and subdivision of the said land. Pyramid had financial problems in 1990. To help Pyramid, he secured contract work for Pyramid from the second respondent. Pyramid's work was not up to the mark. The second respondent stopped the giving of contract works to Pyramid. His relationship with the petitioner soured because of that. IK was dormant until 1993. IK was only involved in housing development. At its

15th AGM, the members of IK resolved not to discuss the resolution proposed by the petitioner to wind up IK. In 2005, IK purchased land held under Lot 552 Mukim Pulai, Johor ('Lot 552'), that is, before presentation of the instant winding up petition. The purchase price (RM320,875) for that land was paid in full in August 2005. Directors' fees were paid in 1999, that is, after all said lots had been sold and profits had been realised, which were not so whilst the petitioner was still a director. Directors' fees of RM100,000 were paid. IK had no staff, or office. The second respondent provided the financial assistance, the office and the use of equipment. The second respondent managed the construction of the infrastructure for the said lots, for IK. From beginning to the end, the second respondent had managed the said land for seven years. The management fee was approved by the board on 13 April 1996, without any objection by the petitioner. All loans to the second respondent were repaid with interest at the rate of 8%pa for the year 2000 and at the rate of 7%pa for the years 2001–2008. He was not obliged to buy the shares of the petitioner who had used the legal process to compel him to purchase those shares. He opposed the winding up petition as IK had been properly managed.

[10] Under cross-examination, the third respondent added as follows. RM750,000 was paid towards management fees. Loans by IK to the second respondent were approved by other directors, although not by the petitioner. The second respondent borrowed from IK, as the second respondent was in need of funds. The second respondent had unappropriated profits of RM82,346,451 in 2007. There was no request from the petitioner to be compensated for his time spent as director of IK. The petitioner rendered assistance, but he was the central figure who had obtained the conversion and subdivision of the said land. The petitioner made many offers of sale of his shares to him. It was within his right not to buy those shares, as they were overpriced (see p 34 of the notes of proceedings). Presently, he would not buy those shares, as the 'company' needed more cash for expansion. It was not his intention to treat the petitioner unfairly. It was the decision of the second respondent at that point to purchase the shares of the fourth respondent. In 2005, before receipt of the notice dated 26 January 2005 (see petitioner's bundle of documents at p 24), IK purchased another property — Lot 552. IK paid the legal fees of all respondents, about RM60,000–RM70,000, to defend this petition.

[11] In their submissions, both learned counsel had very different things to say about the affairs of IK. Yet, this much is certain. On 13 April 1996, the board of directors of IK ratified the payment of RM750,000 to the second respondent, 'as management fee for securing and facilitating approval for land conversion ... and financing the undertaking ... '. At that meeting of 13 April 1996, the board of directors of IK also agreed at the next meeting to consider

a proposal to pay fees to directors. But other than that, there was no record that the petitioner at that board meeting of 13 April 1996 had objected to the payment of the said management fee or said directors' fees. It was however minuted that the petitioner at the 11th AGM of IK held on 29 June 1996 had objected to the payment of the said management fee. But really, that objection of the petitioner, even if it had been made at the board meeting held on 13 April 1996 and not at the AGM held on 29 June 1996, would not have made any difference, as the management fee had already been paid and *post facto* ratification was entirely a matter in the hands of the third respondent. In view of the overwhelming majority of the third respondent, any objection by the petitioner would have been academic. The management fee would have been ratified, with or without objection from the petitioner. Nevertheless, it would not appear that the payment of the management fee by IK to the second respondent, although dictated by the third respondent and even though the quantum of management fee could be on the high side, had financially prejudiced the petitioner. Indeed, it would even be said that the payment of the management fee had 'enriched' the petitioner, as the petitioner had 10% of the issued share capital of the second respondent. With payment of the management fee by IK to the second respondent, the petitioner had doubled up, so to speak, on his 'beneficial interest' in the management fee of RM750,000.

[12] It would also not appear that the inter company loans had financially prejudiced the petitioner. For a start, those inter company loans had brought income that would otherwise not have accrued to IK. Besides, the rate of interest paid by the second respondent would have been at or about the then fair market rate. Perhaps the good sense to loan out the entire funds of IK to the second respondent without any security whatsoever could be questioned. Whether those loans were in the best interest of IK in the first place could also be queried. But otherwise, there was really not much that the petitioner could say against the management fee or inter company loans.

[13] Even so, it would still appear that the matters complained of were greater than the sum total of its individual parts. It would seem that the affairs of IK were conducted or the powers of the directors were exercised in a manner oppressive to the petitioner. The payment of directors' fees was one such example where alone the petitioner had lost out. The payment of directors' fees was approved by IK at its 15th AGM held on 16 June 2000. But sanction for that payment was not the issue. The issue was about the fairness of the transaction. In relation thereto, it is relevant to bear in mind the reason that was given for those directors' fees. At the 16th AGM of IK held on 28 June 2001, the petitioner enquired on the justification or those directors' fees. In response, the third respondent replied that 'the directors' fees amounting to RM100,000 for the year ended 1999 (were for) services

rendered by the directors since ... incorporation' (see PB21). But if directors' fees were for services rendered since incorporation, then the petitioner should not have been left out. It is an agreed fact that IK was incorporated in 1982 with the petitioner and the third respondent as the promoters and original subscribers. The said land was purchased in 1993, that is, during the time that the petitioner was a director. Four subdivided lots were sold in 1996. That evinced that the said land was purchased, converted and then subdivided all during the time that the petitioner was a director. The crucial decision to purchase the said land was made during the time that the petitioner was a director. The equally crucial approval for conversion and subdivision of the said land was obtained during the time that the petitioner was a director. In other words, all things that set IK on the road to success were put in place during the time that the petitioner was a director. Even the infrastructure of the said lots could have been in place during the time that the petitioner was a director, as four of those lots were sold in 1996, which would probably not have been sold, certainly less likely to have been sold, without infrastructure. Evidently, everything crucial for the success of the development of the said land had been in place by the time the petitioner resigned in 1996. The third respondent contended that it was him and not the petitioner who had obtained the formal approval for conversion and subdivision of the said land. That might have been so. Nonetheless, it remained that the petitioner was a director during the crucial years. Even if the contribution of the petitioner were less than the third respondent, it could not have been less than those directors appointed after him. If it were indeed so that directors' fees were for services rendered *since incorporation*, then the contribution of the petitioner should not have been totally disregarded. The petitioner should not have been left out of a share of those directors' fees.

[14] It was not always all that audacious, but the present state of affairs of IK could only further oppress the petitioner, if continued. IK was dormant for 11 years, a period of business inertia which suggested that the petitioner and the third respondent had incorporated IK without a specific business undertaking in mind. Anyway, it was stated by the third respondent at the 14th AGM of IK held on 28 June 1999, that the 'company exists because of the six (6) pieces of industrial land at Larkin ... the company had sold four pieces and two more are being offered for sale at RM38 psf' (see PB9). If that were so 'that the company exists because of those six industrial lots' then there was no reason for IK to continue after 1999, that is, after the sale of all six lots. On the basis of what the third respondent had said, the *raison d'etre* for the existence of IK was lost with sale of all six lots in 1999. The third respondent did qualify at the 14th AGM that the future of IK would have to be decided by the shareholders. Nevertheless, the reason for the 'existence' of IK had been clearly spelt out by the third respondent. The 15th AGM of IK might have resolved not to discuss the resolution proposed by the petitioner to wind up IK. But that could not and would not change the object of IK,

which was the development of the said land. Upon completion of the development of the said land, was it unreasonable on the part of the petitioner to ask for the return of his investment? Was the return of investment not a legitimate expectation? The third respondent said that he opposed winding up, as he had not mismanaged IK. But the complaint was never about any mismanagement. Incidentally, in *Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors* [2007] 1 MLJ 508, it was again restated, on that occasion by James Foong JCA, as he then was, that mismanagement of the company does not necessarily constitute oppression or disregard of a member's interests and that s 181 does not give jurisdiction to the court to interfere with the internal management of companies. The instant complaint was that the affairs of IK were conducted and or that the powers of the directors were exercised in manner oppressive to the petitioner. The fact of the matter was that the parties had totally fallen out. It was made more than clear on more than one occasion by the petitioner that he wanted the return of his investment. The object of IK had been achieved. Was there a legitimate reason to hold on to the investment of the petitioner? It would have been different if the object of IK had not been achieved. It was not as if the capital and or even profits had been reinvested. In fact, IK was totally inactive from 1999–2005. It could even be said that IK was totally inactive from 1999 to present, as it would certainly appear, that more likely than not, that Lot 552 Mukim Pulai, Johor was hurriedly purchased in 2005 (for RM320,875 which is less than 10% of the total shareholders' funds) to resist the impending petition by the petitioner who had always been overt with his intended action, to wind up IK.

[15] The fourth respondent's investment was returned together with profits. But the petitioner's was not. Effectively, the petitioner is the only minority shareholder of IK. The third respondent said that it was the decision the second respondent at that point to purchase the shares of the fourth respondent. But the truth was that the second respondent could not have purchased the shares of the fourth respondent without the agreement of the third respondent who controlled the second respondent. Indeed, many crucial answers from the third respondent were far from satisfactory if not downright cynical. The third respondent admitted that the second respondent had unappropriated profits of RM82,346,451 in 2007. Yet the third respondent could say that the second respondent was in need of funds and therefore needed to borrow from IK. The asking price of the petitioner was based on the cash in hand position of IK. Yet the third respondent could say that the petitioner's shares were overpriced. Substantial funds of IK were idle for years and or were 'loaned out' from 2000–2007 to the second respondent (see agreed fact 17). Clearly, IK had funds in excess of its needs. Yet the third respondent could still say that IK needed funds for expansion and that he/second respondent would not therefore purchase the shares of the

petitioner. In truth, any return to the petitioner of his investment, be it by way of reduction of the share capital of IK or by way of purchase of the shares of the petitioner, was easily doable. Any reduction of the share capital of IK would not be more than 5% of RM3,797,691.62 (the unappropriated profits of IK in 2007) and would only reduce unappropriated profits which in any event were well in excess of the needs of IK. And because the asking price of the petitioner was based on the cash position of IK, any purchase of the shares of the petitioner would not really require any real outlay by any purchaser. Of course, it was within the right of the second or third respondents to reject the offer of the petitioner. However, the pertinent question is whether this state of affairs, where the petitioner is effectively the sole minority shareholder, where the investment of the petitioner is shackled to a company in which the petitioner has no role or voice, where the company has a history of prolonged business inactivity running into years, and where it would therefore not seem that the petitioner would soon see the return of his investment despite the inactivity of the company, should continue.

[16] Section 181 of the Companies Act 1965 provides as follows:

> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground —
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may —
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in future;
>
> (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
>
> (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up. A

[17] The leading authority on s 181 is of course; *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227, where the Privy Council first observed that the aforesaid s 181 can trace its descent from s 210 of the United Kingdom Companies Act 1948, and then imparted the following which since have guided all courts: B

(a) s 181 is wider than the United Kingdom section;

(b) sub-s (1)(a) adds disregard of the interest of members, etc, to oppression as a ground for relief; C

(c) sub-s (1)(b) adds a new ground;

(d) sub-s (2) sets out the kinds of relief;

(e) s 181 requires (under sub-s 1(a)) a finding of 'oppression' or 'disregard', and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. D

[18] The Privy Council furthermore imparted that: E

> ... for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more, of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked, As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd*): Their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale*). Neither 'oppression' nor 'disregard' need be shown by use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line. F G H
>
> ... in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg, In *Re Jermyn Street Turkish Baths Ltd*); where there has been oppression in the past the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(1)(a)) relates to a present state I

A of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a)) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of
B the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a
C remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd*.

[19] The above is an undoubted guide. But there is no universal definition on the meaning of 'oppression'. In *Jaya Medical Consultants Sdn Bhd v Island*
D *& Peninsular Bhd & Ors* [1994] 1 MLJ 520; [1994] 1 AMR 381 at p 398, Siti Norma J, as she then was, held that 'as it is quite impossible to lay down categories of conduct considered to be oppressive, each case has to be examined in the light of its own particular facts and thus the particular types of conduct complained of in cases cited, merely tend to illustrate whether
E such conduct can be regarded in law to be oppressive... For there to be oppression, there must be a visible departure from the standard of fair dealing or fair play or where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor'.

F **[20]** In *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 at pp 804–806, Anuar J (as he then was) similarly held, that by citing *Re Tivoli Freeholds Ltd* [1972] VR 445, that what is oppressive depends upon all the circumstances and is beyond universal definition:

G

In *Re Tivoli Freeholds Ltd* at p 452, Menhennitt J said: 'Whether or not a company is being conducted in a manner oppressive to certain shareholders depends upon all the circumstances and it is not possible to attempt a universal definition. However, in the kind of situation which arises in this case and having regard to the
H matters relied upon by the petitioner and the supporting members, the following elements are I think included in the matters postulated in the section and are also established by the authorities:

(1) Those alleging that the affairs of the company have been conducted in a manner oppressive to them must establish, as one element, conduct which
I the Court of Appeal has recently restated in the case of *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at p 1059, as conduct which is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Cooperative Wholesale Society Ltd v Meyer* [1959] AC 324 at p 342, 'burdensome, harsh and wrongful' to the other members of the company or some of them and lacks that degree or probity which they are entitled to

expect in the conduct of the company's affairs: see *Scottish Co-operative Wholesale Society Ltd v Meyer* and *Re HR Harmer Ltd* [1959] 1 WLR 62. It is to be noted that Buckley LJ, delivering the judgment of the court, appears to have stated lack of probity of the kind described as an element additional to the requirement that the conduct must be unfair or burdensome, harsh and wrongful. In *Scottish Co-operative Wholesale Society Ltd v Meyer*, Lord Keith at p 364, stated the test as lack of probity and fair dealing', using the word 'and'. However, in Lord Keith's judgment in *Elder v Elder and Watson Ltd* [1952] SC 49 at p 60, adopted by Jenkins LJ in the case of *Re Harmer Ltd* at p 78, Lord Keith said: 'oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary right as a shareholder'. There it is put in the alternative. In the light of these statements, I deal with this petition on the basis that there may be cases in which either lack of probity or unfairness may be sufficient in itself to make conduct oppressive to a member. In the unreported decision of Lush J in *M Dalley & Co Pty Ltd* (30 April 1968) His Honour stated, at p 43: 'In my opinion want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative 'lack of probity or fair dealing' by Lord Keith indicates. One person may 'subject another to continual injustice' by insisting, however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified in law.' Later in his judgment as part of his finding that there had been oppression in that case His Honour said at p 45, that 'the respondents were fixed in their determination to classify the petitioner's shares as employee shares and so to remove her from the company at relatively small cost and to their own and their children's advantage'.

A B C D E

He later said that the respondents' stand was 'dictated by the self interest of the directors and obdurately maintained' (at p 46). Although the High Court reversed the decision of Lush J on another point ((1968) 43 ALJR 19), the order made by the High Court, at p 24, was an order for the purchase of the shares of minority shareholders, which can be made only under s 186 of the Companies Act 1961 and not on the just and equitable ground alone under s 222(1)(h). For this reason, it appears to me that the High Court's order in *Dalley*'s case affirms the conclusion that there was oppression in that case. Accordingly, I proceed on the basis that persistent illegal conduct towards a shareholder may be sufficient to constitute oppression of him if it is dictated by self-interest.

F G

(2) The oppression must be of the members as such, that is in their capacity as shareholders. It was so decided in *Re HR Harmer Ltd* [1959] 1 WLR 62 at p 75, in respect of the English equivalent provision, namely, s 210, and the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1012, held that this consideration applies to s 186(1) of the Victorian Companies Act: see also per Lord Keith in the passage cited above from *Elder v Elder and Watson Ltd* 1952 SC 49.

H I

(3) It appears to follow from the last mentioned concept and the reference in the section to the affairs of the company being conducted in a manner oppressive to members that there must be something adverse, or detrimental

to the members' financial interests as shareholders. In all the reported cases of which I am aware, where oppression has been found, this has been the fact and it was this aspect to which I understand Jacob J, referred when he said in *Re Broadcasting Station 2GB Pty Ltd* [1964–5] NSWR 1648 at p 1662, that, the word oppressive involves, among other things, that 'some member or members have suffered in a pecuniary sense in their capacity of members (*Scottish Co-operative Wholesale Society v Meyer*) that is to say, their rights as members have been affected'.

(4) The affairs of the company must be being conducted in a manner oppressive to some member or members when the petition is presented. This is involved in the expression 'are being conducted': see *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at p 1059.

(5) Oppression may occur even although all the members of a company are treated equally: see, for example, *Meyer*'s case. The unfairness may arise, for example, by reason of an advantage to a parent company.

(6) So far as the alleged oppressors are concerned, It must also be established it seems to me that oppression results from 'some overbearing act or attitude on the part of the oppressor': *Re Jermyn Street Turkish Baths Ltd* at pp 1042 and 1060. In delivering the judgment of the Court of Appeal, Buckley LJ, having defined aspects of oppression applicable to that case, then said at p 1060: 'We do not say that this is so far as the alleged oppressors are concerned, it must also be necessarily a comprehensive definition of the meaning of the word 'oppressive' in s 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

Having stated that what had earlier been said was not necessarily a comprehensive definition, His Lordship appears to me to have then stated what is a universal element in the sentence beginning 'oppression must, we think, import'. Again, whilst not stating it as a universal test, the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011, applied the test that 'conduct would be oppressive within the meaning of s 186 if directors or shareholders holding a controlling power in the direction of the company's affairs were to pursue a course of conduct designed by them to advance their own interests or the interests of others of their choice to the detriment of the company or the detriment of other shareholders'. The concept of 'some overbearing act or attitude' appears to me to be involved in Viscount Simond's expression 'burdensome, harsh and wrongful'. To determine whether conduct is unfair it is necessary to examine it from the point of view of both the alleged oppressed and the alleged oppressor. In *Re M Dalley & Co Pty Ltd*, in making his findings of oppression, Lush J relied upon his findings that the respondents had sought to remove the petitioner from the company at relatively small cost and had been dictated by self interest.

(7) It is a corollary of the element referred to in (6) above that 'it was not intended by s 186 or s 94 to give jurisdiction to the court (a jurisdiction the courts have always been loath to assume) to interfere with the internal management of a company by directors who in the exercise of the powers conferred upon them by the memorandum and articles of association are acting honestly and without any purpose of advancing the interest of themselves or others of their choice at the expense of the company or contrary to the interest of other shareholders' (per the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011).

Buckley J, as he then was, referred to the same aspect in *Re Five Minute Car Wash Service Ltd* [1966] 1 WLR 745 at p 751; [1966] 1 All ER 232 at pp 246–247, when he said: 'The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed.'

[21] Mohd Ghazali J (as he then was) in *Dato' Toh Kian Chuan v Swee Construction and Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730, adopted with approval the following excerpts from *The Law of Company Liquidation* by J O'Donovan (3rd Ed), at pp 143–144:

It has frequently been stressed that s 320 is not intended to provide minority shareholders with a means of stultifying the voting power of the majority: ...

The mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which the other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority (*Re Harmer Ltd* [1959] 1 WLR 62 at p 87 per Romer LJ).

Hence, it does not constitute oppression for those in control to insist upon the adoption of a policy on a matter of business on which there may be legitimate differences of opinion, nor is it oppression if an existing state of inequality results from the provisions of the constitution of the company and not from any action on the part of those in control.

The word 'oppressive' was defined in *Re Harmer Ltd* (referred to above) to mean 'burdensome, harsh and wrongful'.

[22] The question of whether there is oppression in a given case is a question of fact, to be answered not by a consideration of events in isolation but as part of a consecutive story (*Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237, per Gopal Sri Ram JCA, as he then was). Here, the total story showed that majority rule had passed into rule oppressive of the petitioner. The business object had been achieved. Capital and profits had not been reinvested. Under those circumstances, the return of investment was a legitimate expectation. As it happened, the investment of the fourth respondent was returned, by way of the purchase of the shares of the fourth respondent. But the investment of the petitioner was 'detained', despite the fact that all capital and accumulated profits were there and not reinvested. The majority would rather have the capital and profits lying idle, so it would seem, to spite the petitioner. It was on account of the will of the majority that IK was completely idle, practically moth-balled, for six years. That could not have served the interest of the minority. It was the abuse of majority rule to have IK idle for all those years in the face of the demand by the petitioner for the return of his investment. That abuse was also a visible departure from the standards of fair dealing and a violation of the conditions of fair play which the petitioner was entitled to expect from the majority, which was certainly not to hold on idly to his investment for years and years on end. If there were no use for capital, then rightly so it should be returned.

[23] The purchase of Lot 552 was put forward to resist this petition. But Lot 552 was only purchased in 2005. Hence, Lot 552 could not be advanced to exculpate the inactivity of IK from 1999–2005. In fact, it could even be said that the inactivity of IK was from 1999 onwards, if not for the purchase of Lot 552 in 2005. But as said, it would only seem that Lot 552 was hurriedly purchased to lend a convenient excuse to the majority to resist this petition. For if it were true that Lot 552 was purchased as a genuine business undertaking, then there would not have been that absence of evidence from the majority on the progress of the development of Lot 552 since 2005. The fact that the majority could not relate on the development of Lot 552 since 2005 only say that Lot 552 was purchased and then left just like that in its original condition. That should not be so if it were a genuine business undertaking. In fact, there were no appearances of a genuine business undertaking. It was improbable that Lot 552 would have been purchased as a genuine undertaking. Lot 552 would have been purchased solely to resist this petition.

[24] There was no answer to the matters complained of. All things considered, it was made out that the affairs of IK were conducted in a manner oppressive to the minority. That should not be allowed to continue. Relief could not be granted. The majority opposed winding up. The minority wanted out. Both positions were not irreconcilable. Of the options, the

reduction of share capital, which would hardly touch the capital of IK, would seem most appropriate, if not even ideal. A reduction of share capital would kill two birds with one stone. It would allow the majority to continue with IK free of the pesky, if there were the case, minority, and the minority to be free of the matters complained of.

[25] Accordingly, and for the reasons given hereinbefore, it is hereby ordered that the capital of IK be reduced by 5%, that is, by the purchase of the said 25,000 ordinary shares of the petitioner by IK, and by the payment of 5% of RM3,797,691.63 (the unappropriated profits of IK in 2007) by IK to the petitioner, all to be completed within 30 days from the day of this order. It is further ordered that the second to fourth respondents do bear the costs of this petition.

Petition allowed with costs to be borne by second to fourth respondents.

Reported by Kanesh Sundrum